Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN WELLS, PETITIONER

v.

JAMES R. LAMZ; TOM W. THORNHILL; COMMITTEE TO ELECT JIM LAMZ; THORNHILL LAW FIRM, LLC; CHARLES C. FOTI, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss When the Court Had Jurisdiction to Hear the Case Under the Declaratory Judgment Act and the Eleventh Amendment Did Not Bar the Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal

II. Whether the Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss Against Defendants Lamz, Thornhill, Thornhill Law Firm, LLC and Committee to Elect Jim Lamz' Motions to Dismiss When There Was a Deprivation of the Plaintiff's First Amendment Right to Freedom of Speech and the Actions of the Defendants Constituted State Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. The decision of the United States District Court for the Eastern District of Louisiana is unreported.

JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on certiorari. The final judgment of the United States Court of Appeals for the 5th Circuit was entered on November 13, 2006. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does question the constitutionality of R.S. 18:1463 State Legislature. The Louisiana Attorney General was a party in the court below.

RELEVANT PROVISIONS INVOLVED

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

U.S. Const. Amnd I
U.S. Const. Amnd V
U.S. Const. Amnd XI
28 U.S.C. § 1291
28 U.S.C. § 1331
28 U.S.C. § 1343
28 U.S.C. § 1367
28 U.S.C. § 2201

42 U.S.C. § 1983
42 U.S.C. § 1988
Louisiana Constitution Article IV § 8
R.S. 18:1463
R.S. 49:251
R.S. 49:252

Pertinent text of citations are set out in the appendix.

STATEMENT

This case goes straight to the heart of political speech. A desperate candidate used an unconstitutional statute to successfully curtail the speech of his opponent. Through the abuse of the judicial process, respondents were able to chill the petitioner's speech and force him off the campaign trail.

Petitioner John B. Wells and respondent James R. E. Lamz were in a closely contested race for the City Judgeship of Slidell, Louisiana. On October 29, 2004, four days before the November 2, 2004 general election, Tom W Thornhill and the Thornhill Law Firm, on behalf of Lamz, maliciously filed a Strategic Lawsuit Against Public Participation (hereinafter SLAPP) against Wells. The suit was brought under Louisiana R.S. 18:1463. The suit sought injunctive relief without hearing, to prevent plaintiff from airing commercials or mailing campaign literature. The suit also sought criminal sanctions against Wells.

On October 29, 2004, the 22nd Judicial District Court for the Parish of St. Tammany denied Lamz' motion for a Temporary Restraining Order. A hearing was set for November 3, 2005, the day after the election.

As a result of the Motion for a Temporary

Restraining Order, Wells was forced to cancel a gathering at an intersection planned for October 29, 2004 to pass out flyers. He was required to travel to Covington to file an opposition and to wait for a hearing by the Judge. This prevented him from conducting his door to door campaign during the morning and afternoon of October 29, 2004. As a result of the Motion for a Preliminary Injunction Wells was forced to spend most of the weekend before election preparing an opposition and a Special Motion to Strike, instead of campaigning door to door and passing out flyers at high visibility locations.

On Election Day, November 2, 2004, Wells was declared the winner of the election by forty votes by the electronic and print media. On November 3, 2004, absentee votes discovered in the wee hours of the morning changed the outcome and Lamz was declared the winner by 184 votes out of 35,250 votes cast. Also on November 3, 2004, the 22nd Judicial District Court denied Lamz' motion for a preliminary injunction.

The law suit brought against Wells by Lamz constituted malicious prosecution and an abuse of process under state law. The state court recognized that Lamz could not prevail on the merits and dismissed the SLAPP suit on March 24, 2005. The 22nd Judicial District Court found that the campaign information distributed by Wells was true and consistently verified. A Motion for New Trial was denied on April 4, 2005. Lamz' appeal was also denied. *Lamz v. Wells*, 938 So.2d 792 (La. 1 Cir. 2006).

The court specifically found that the campaign literature published by Wells was true. The state court further found that there was no merit to the criminal charges brought pursuant to R.S. 18:1463. Finally the court noted that Thornhill had exaggerated the

comments made by Wells in his campaign literature.

As a result of the SLAPP suit, Wells was forced to cancel a gathering at an intersection planned for October 29, 2004 to pass out flyers. He was also required to travel to the Parish seat to file an opposition and to wait for a hearing by the Judge. This prevented him from conducting his door to door campaign during the morning and afternoon of October 29, 2004. Wells was deprived of sleep the evening of October 28-29 2004 reviewing the petition and preparing a response. He also was forced to spend time preparing an opposition and a Special Motion to Strike instead of campaigning door to door and passing out flyers at high visibility locations on the final weekend before the election.

The United States District Court for the Eastern District of Louisiana dismissed the case against the Attorney General for lack of jurisdiction and further found that the Eleventh Amendment barred the action. The court found that Wells did not have standing to bring the action against any defendants because his First Amendment rights were not sufficiently impaired. The court also found that Lamz, Thornhill, and the other defendants were not state actors. The Court of Appeals for the Fifth Circuit affirmed. After the Fifth Circuit action, Wells abandoned his plans to seek election as a State Representative.

REASONS FOR GRANTING THE PETITION

I The Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss When the Court Had Jurisdiction to Hear the Case Under the Declaratory Judgment Act and the Eleventh Amendment Did Not Bar the Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal

A. The Court Had Jurisdiction to Hear the Case Under the Declaratory Judgment Act

This Court has repeatedly held that federal court jurisdiction lies under the Declaratory Judgment Act. 28 U.S.C. § 2201. *MedImmune Inc. v. Genenech, Inc.*, 127 S.Ct. 764 (2007); *Perez v. Ledesma*, 401 U.S.82, 130 (1971). Most other Circuits have found jurisdiction under this law, especially when the Constitutionality of a statute is in question. *See, e.g., National Rifle Ass'n of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997). As long as an active case and controversy can be established, as in the instant case, the other Circuits have held that jurisdiction lies. *Volvo Const. Equipment North America, Inc. v. CLM Equipment Company, Inc.* 386 F.3d 581, 592 (4th Cir. 2004); *Goodyear Tire & Rubber Co. v. Releasommers, Inc.*, 824 F.2d 963, 955 (Fed. Cir. 1987).

Federal courts have "original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C.A. § 1331. Furthermore, federal courts have jurisdiction to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right,

privilege, or immunity secured by the Constitution of the United States. . . ." 28 U.S.C.A. § 1343(a)(3). A federal court has the further authority to grant the requested relief under 28 U.S.C. § 1343(3) and attorney fees under 42 U.S.C. § 1988(b).

The suit in this matter was brought under the Declaratory Judgement Act. This Act "expands the scope of available remedies" and permits persons "to seek a declaration of the constitutionality of the disputed government action." Specifically, a pending criminal action is not required to grant a federal court the jurisdiction to review the constitutionality of a state statute. *Steffel v. Thompson* 415 U.S. 452, 462 (1974).

It is well settled that to establish a case or controversy sufficient to give a federal court jurisdiction, Wells had to meet the three criteria outlined by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a plaintiff must show that he has suffered, or is about to suffer, an "injury in fact." Second, "there must be a causal connection between the injury and the conduct complained of." Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id.

Wells' complaint was cognizable because it alleged a deprivation of his rights to free speech at the hands of state actors. Additionally, criminal sanctions were sought against him pursuant to R.S. 18:1463. Wells' deprivation of free speech rights constituted real and concrete injury. "It is undisputed that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The facts articulated in the Complaint met the first requirement of *Lujan*. Additionally, Wells decided not to seek another office, in part, because of the existence of the statute in question.

Wells also met the second prong of the *Lujan* test. He averred a causal connection between the statute and the abridgement of his right to speak freely without fear of prior restraint or criminal penalties being improperly applied. The existence of the statute allows the State to examine and approve of political speech. With the specter of the statute hanging over his head, Wells' free speech rights were rendered utterly meaningless. As discussed *infra*, R.S. 18:1463 impermissibly restricts Wells' federal First Amendment right of free speech. Wells' protected interest is the clearly established constitutional right to free speech under the First Amendment.

Nor can it be said that the end of the election has terminated the controversy in this matter. It is well settled law that a matter is not moot if it is capable of repetition yet avoiding review. *See, e.g., Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911); *Sibron v. New York*, 392 U.S. 40 (1968); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Super Tire' Engineering Corp. v. McCorkle*, 416 U.S. 115, 125 (1974). Thus although the controversy has ended in the state court, it is still ripe under this exception to the mootness doctrine. Additionally, it is also well settled that the chilling effect of prosecution upon the exercise of free speech may provide a controversy even if prosecution is not ongoing. *Dombrowski v. Pfister*, 380 U.S. 479 486 (1965); *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969). Even the threat of sanctions may deter almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Here there has been more than a mere threat - there was an actual attempt to prosecute Wells. The court's refusal to consider the

constitutionality of R.S. 18:1463 was a factor in Wells' decision to reconsider his candidacy for State Representative. As in *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975) this Court should not leave Wells and other candidates to operate in the shadow of civil and criminal sanctions of a statute whose constitutionality is in serious doubt.

Wells has also met the reasonableness standard articulated by *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) and other jurisprudence addressing First Amendment challenges to state criminal statutes. Given the fact that the controversy is ongoing and an attempt at imposing criminal sanctions has been made, there can be no question that his fear is eminently reasonable.

Favorable action ruling the statute unconstitutional will resolve the matter completely. Without such an intrusive unconstitutional statute, the State will be unable to act as a censor of political speech. Wells and other political candidates would no longer have to fear the State acting as a filter for their campaign literature or sanctioning them for statements that the Attorney General does not like.

B. The Attorney General Was a Proper Party

The court below found that Foti could not enforce the challenged statute. That was clear error. Louisiana law merely regulates the Attorney General's ability to bring a criminal prosecution. It does not eliminate it. *State v. Neyrey*, 341 So.2d 319 (La. 1976). As noted by the *Neyrey*, court, the Attorney General may act with the district attorney's permission or judicial authorization. Article IV § 8 of the Louisiana

Constitution. The Attorney General can institute prosecution under two sections of this Constitutional provision. He has done so engaging in many Hurricane Katrina related prosecutions.

The Louisiana Legislature has contemplated the Attorney General's involvement in criminal prosecutions by requiring him to provide a biennial report on civil suits and criminal prosecutions that he is involved with. R.S. 49:252. Additionally, the Attorney General is empowered to issue opinions concerning the state of the law. R.S. 49:251. The Attorney General can advise district attorneys as to the applicability and constitutionality of state law. Notably, the Attorney General has already issued opinions concerning R.S. 18:1463.

Finally, the Louisiana Legislature has dictated that in state court actions concerning the constitutionality of a state statute, the Attorney General must be a party. The rules of this Court require the state Attorney General to be served in matters dealing with the Constitutionality of a state statute.

B. The Statute Chilled Appellants First Amendment Rights

The court below, in direct contravention of the holdings of this Court, found that the interference with Wells' First Amendment rights was not of constitutional dimension. That decision flies in the face of settled First Amendment law. As delineated in *Elrod v. Burns*, *supra.*, even the minimal loss of First Amendment freedoms causes irreparable harm. "Direct restrictions on the content of candidate speech are simply beyond the power of government to impose." *Republican Party v. White*, 536 U.S. 765, 793 (2002)(Kennedy, J., concurring).

Content-based restrictions are presumptively invalid, *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382 (1992), and must be subjected to the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988). Under the strict scrutiny standard, the State has the burden of proving (1) that the restriction is necessary to serve a compelling state interest and (2) that it is narrowly drawn to achieve that end. *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

The statute simply cannot survive strict scrutiny.

Despite the statutory language, which facially claims a compelling interest, one does not exist. There is no legitimate state interest in silencing a political candidate. In *State v. Burgess*, 543 So.2d 1332 (La.1989) the Louisiana Supreme Court analyzed the statute and found:

> the term "false" as used by the legislature does not conform to the constitutional standard and includes protected speech. In addition, the terms "scurrilous" and "irresponsible adverse comment" are so broad as to include both true speech and protected false speech about a candidate. Moreover, we find it particularly disturbing that this statute applies to "scurrilous, false, or irresponsible adverse comment" concerning "a proposition to be submitted to the voters." By impacting on the discussion of issues before the voters, this section of the statute comes close to regulating "pure speech," which is entitled to "comprehensive protection under the First Amendment."

Burgess, 543 So.2d at 1335.

Unfortunately, the *Burgess* court did not address

the enforcement provisions of 18:1463(D) and (E) which remain "good" law.[1] *Burgess* is important, however, because under its teachings the statute cannot meet the compelling interest prong of the strict scrutiny standard. *Burgess* also points out that the statute is not "narrowly tailored" in that it includes both true and protected false speech. Noting that the "actual malice" standard applies, the *Burgess* court went on to find 18:1463(B) and (C) unconstitutional.

The application of the statute to Wells was based, at least in part on the campaign pamphlets and leaflets that he produced. In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), this Court held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. The Court noted that pamphlets and leaflets "have been historic weapons in the defense of liberty" and allowing the ordinance to stand "would restore the system of license and censorship in its baldest form." *Lovell*, 303 U.S. at 452. Effectively, that is what the current statute does. It allows the State and even the campaign opponents, to license and censor a candidate's political speech. In that respect, this case is similar to *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2794 (2004) where the enforcement of a statute was enjoined because of the potential chill upon protected speech. As a result of this statute, speakers may self-censor rather than risk the perils of trial under an unconscionable law.

This Court has also held that when a statute "effectively suppresses a large amount of speech that

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[1] *Burgess* addressed only R.S. 18:1463(B) and (C) which has since been amended by the Legislature. *Burgess*, 543 So.2d at 1334. The present language has not yet been ruled unconstitutional.

adults have a constitutional right to receive and to address to one another ... [it] is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft*, 124 S. Ct. at 2791. *Reno v. A.C.M.R.* 521 U.S. 844, 874 (1997). Consequently, the strict scrutiny standard must be applied to R.S. 18:1463. As discussed herein, the statute cannot meet either prong of that standard and should be declared unconstitutional under the federal Constitution.

The statute also allows for prior restraint on political speech. Prior restraint on speech is presumptively invalid and may be sustained only under the most extraordinary circumstances. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Schneider v. State*, 308 U.S. 147 (1939); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).This Court has noted that there is a potential for particularly great damage if the prior restraint affects the commentary on current events. *Nebraska Press Ass'n v. Stuart supra.*, 427 U.S. 539 at 559. Certainly of all political speech, true political speech must be the most important speech of all and deserving of the highest protection. If this Court does not require the district court to consider the issue, unscrupulous candidates can continue to present a clear and present danger to the electoral system and future campaigns.

The statute in question also provides criminal sanctions, both fine and imprisonment, for its purported violation. It is well settled that the potential for criminal prosecution under a statute regulating expression usually inhibits the full exercise of First Amendment freedoms. *Dombrowski*, *supra.* 380 U.S. at 486. The potential victim or defendant is not required to exercise his rights prior to court action. *Id.* The mere threat of

criminal sanction may deter protected speech. *NAACP v. Button, supra*, 371 U.S. at 433. This Court has recently noted that the threat of prosecution may chill protected speech. *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County* 125 S.Ct. 1624, 1626 (2005). This Court has also noted that "the criminal prohibition of speech which by inference can be taken to support a candidate . . . must in itself chill speech on public issues." *Austin v. Michigan Chamber of Commerce* 494 U.S. 652, 701 (1990).

If a federal court does not have jurisdiction to consider this case, then our freedom and the American republic itself will be dis-served. The courts must be ever vigilant to guard against attacks on our civil liberties. As our military guards our shores, the federal courts must guard our political process to ensure that neither the enemies within or without are successful in assailing its ramparts.

D. The Eleventh Amendment Did Not Bar the Action

In contrast to the holdings of the courts below, suits against state officers seeking declaratory relief are not barred by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception to the doctrine of state sovereign immunity is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers *must therefore be permitted* if the Constitution is to remain the supreme law of the land. *Alden v. Maine*, 527 U.S. 706, 747 (1999) (emphasis added). An 11th Amendment bar against suits brought against state officers could prevent the

enforcement of rights enumerated by the federal Constitution. *Id.*

Ex Parte Young stands for the firm proposition that the Eleventh Amendment immunity does not always apply. In *Young*, the Court held that enforcement of an unconstitutional law is not an official act because a state can not confer authority on its officers to violate the Constitution or federal law.

The court below has adopted the holding of *Children's Healthcare Is a Legal Duty, Inc.* v. *Deters*, 92 F.3d 1412 (6th Cir. 1996) for the proposition that *Ex Parte Young*, 209 U.S. 123 (1908) does not apply in criminal matters. That Sixth Circuit decision stands alone in support of the Attorney General's argument. The Eleventh Circuit has refused to follow *Deters*. *Summit Medical Associates, P.C. v. Pryor* 180 F.3d 1326, 1340 (11th Cir. 1999). The Ninth Circuit has similarly distinguished *Deters*. *National Audubon Society, Inc. v. Davis* 307 F.3d 835, 846 -847 (9th Cir. 2002). In the instant case, unlike *Deters*, sufficient connection exists between the Attorney General and the statute. The "compelling" state interest cited by the Legislature invokes the Louisiana Attorney General's civil authority. The criminal enforcement provisions allow him to intervene when requested by the district attorney or on his own initiative with the permission of the court. Finally, he has already established a firm connection with the statute by issuing Attorney General's opinions. Thus this case is unlike *Deters* and *Sherman v. Community Consol. School District 21 of Wheeling*, 980 F.2d 437 (7th Cir. 1992) because the Louisiana Attorney General can play a role in the enforcement of this statute. More importantly, unlike the situation in *Deters* and *Sherman*, the threat of harm exists because an action has been initiated.

Nevertheless, the Fifth Circuit's implicit adoption of *Deters* has caused a split in the Circuits that must be addressed and resolved by this Court.

II. The Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss Against Defendants Lamz, Thornhill, Thornhill Law Firm , LLC and Committee to Elect Jim Lamz' Motions to Dismiss When There Was a Deprivation of the Plaintiff's First Amendment Right to Freedom of Speech and the Actions of the Defendants Constituted State Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal.

A. There Was a Deprivation of the Plaintiff's First Amendment Right to Freedom of Speech

The court below found improperly that there was no deprivation of a protected constitutional right. This is in direct contravention of the holdings of this Court. It is well settled that political speech is a right secured by the Constitution. Furthermore, the First Amendment "has its fullest and most urgent application" to speech uttered during a political campaign. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Without question, the free exchange of ideas in a political campaign is at the heart of American constitutional democracy. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). In the instant case, the state court found that Wells' statements were protected by the First Amendment.

As discussed supra., the potential for criminal sanctions is sufficient, as a matter of law, to establish the

denial of a First Amendment right. *Smith v. People of State of California, supra. Dombrowski v. Pfister supra.*

As discussed above, the actions acted to deprive Wells of his right to speak. The court below, in its ruling, found that Wells could not show that his right to speak was actually restrained. That was not the case.

While Wells was not subject to a restraining order issued by the court the actions of the appellees restrained Wells' speech just as effectively as if he had been muzzled by a court order. As articulated in the complaint at ¶s LX[2] and LXI[3] Wells' speech was suppressed. The fact that the state court restricted the scope of the damage does not mean that no damage occurred.

As a result of the Motion for a Temporary Restraining Order, Wells was forced to cancel a gathering at an intersection planned for October 29, 2004 to pass out flyers. Wells was also forced to travel to Covington to file an opposition and to wait for a hearing

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[2] ¶LX states:
LX.

The actions of defendants Lamz, Thornhill and Thornhill Law Firm, LLC and the Committee to Elect Jim Lamz chilled plaintiff's right to free speech and prevented him from pursuing his campaign as forcefully as he would have otherwise, which along with the other factors delineated herein, resulted in his electoral loss.

[3] ¶LXI states:
LXI.

The actions of defendants Lamz, Thornhill and Thornhill Law Firm, LLC and the Committee to Elect Jim Lamz forced Wells to take additional time from campaigning to respond to the frivolous, malicious, vicious politically motivated lawsuit which prevented him from speaking to the public about his campaign and along with the other factors delineated herein, such as the effect of the false allegations on the electorate, resulted in his electoral loss.

by the Judge. This prevented him from conducting his door to door campaign during the morning and afternoon of October 29, 2004. Finally, because of the Motion for a Preliminary Injunction Wells was forced to spend the weekend before election preparing an opposition and a Special Motion to Strike instead of campaigning door to door and passing out flyers at high visibility locations.

Oddly enough, the district court found that Wells was not deprived of his rights by having to appear in court one day. The court went on to say that under the case law, the loss of one day from the campaign trail was not sufficient constitutional deprivation. Additionally, as delineated *supra*, there was more than one lost day. Wells spent many hours preparing responsive briefs in the last days preceding the election. Thus he suffered more than one lost day in court.

Accordingly, the court below erred. Wells suffered a harm of Constitutional dimension and the district court should not have dismissed the Complaint. The Fifth Circuit's affirmance was also error.

B. The Actions of the Defendants Constituted State Action

The district court below found that state action was a "close call" but still erred in finding no state action. In affirming the district court, the Fifth Circuit disregarded the guidance provided by this Court.

The statutory requirement of action "under color of state law" and the "state action" requirement of Fourteenth Amendment are identical. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929-930 (1982). Conduct is fairly attributable to a state where: (1) it is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by

the State or by a person for whom the State is responsible;" and (2) where the party charged with the deprivation is a person who may "fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). The first prong of this test is met on the face of the petition and amended petitions filed in State court since it is undisputed that the State created R.S. 18:1463 and that defendants based their suit on that provision of the law.

In meeting the second prong, the defendants must be shown to have performed an action where the challenged conduct may be "fairly attributable to the State." *Lugar*, 457 U.S. at 937. *Lugar* provides three tests - any one of which can be used to meet this requirement. The court below only addressed one in its ruling.

Under the public function test, a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *See Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir.1989). Here the defendants entered an area exclusively left to the state - the filing of criminal charges and the request for criminal sanctions.

Liability also lies under the state compulsion test which provides that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Here the State granted defendants a private right of action under 18:1463D(1). This was more than mere acquiescence. It was overt encouragement. The provision for attorneys fees found in R.S. 18:1463D(2) represents further encouragement. Defendants used this provision of the

law to try to deprive the plaintiff of a federally protected right by petitioning for a Temporary Restraining Order without hearing or bond. They actively limited plaintiff's ability to speak by forcing him to respond to the motion and travel to Covington to force a hearing. Thus the State provided an avenue and encouragement for defendants assault on the plaintiff's right to political speech.

In the third *Lugar* test, the nexus or joint action test, state action may be found where the government has insinuated itself into a position of interdependence that it was a joint participant in the enterprise. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974). Again, the instant case meets this test. Here the state offered an avenue via 18:1463D and provided the use of their courts to enforce that avenue. When defendants filed their petition, they brought the court system into joint participation since only the court could issue the injunctive relief or award criminal sanctions and/or attorney's fees. *Shelley v. Kramer*, 334 U.S. (1948). In *Stevens v. Frick*, 372 F.2d 378 (2d. Cir. 1967), the Second Circuit noted that *Shelley* does not apply if the court merely offered a forum for litigation. Unlike the instant case, however, in *Stevens* there was no state statute which authorized the unconstitutional imposition of restraint on a First Amendment right. *Id.* at 381. The Legislature's enactment of this improper restraint distinguished this case from *Stevens* and is sufficient to trigger *Shelley*. The Fifth Circuit's rejection constitutes a split with the Second Circuit that should be resolved by this Court.

Had a Temporary Restraining Order (TRO) been issued there would certainly have been state action under *Lugar*. While no TRO was issued, a state judge did issue a order setting a hearing on the preliminary

injunction. The hearing date was November 3rd, the day after the election. Consequently, Wells was forced to respond to that hearing date. Had no hearing date been set or if it has been set ten days hence, as allowed by the statute, so as not to interfere with the campaign, the state action claim might have been weaker. That was not the case. The action of the state Judge forced Wells off the campaign trail to prepare for the hearing. The district court noted that a Judge would have to do something, even something innocent to trigger state action under the third pong of the *Lugar* test. Scheduling the hearing was sufficient to meet that requirement. While it might have been an innocent act, it was sufficient to trigger state action.

Additionally, Thornhill, by virtue of his status as an officer of the court pursuant to La. Code of Civil Procedure art. 371, is also a state actor in his own right. Art. 371 legislatively makes an attorney a state official.

In the instant case, the Complaint articulates personal action by Thornhill and his law firm to take action to deprive plaintiff of his Fifth Amendment right to due process and his right to free speech. The eventual dismissal in this case is of no moment since Wells had to halt political speech to contest the illegal actions of the defendants. The actions also chilled Wells' right to free speech because the prospect of money damages and criminal sanctions remained even after the injunctive relief was denied. The denial of injunctive relief, in itself, came only after the election and after the plaintiff was forced to spend many hours contesting the issue, at the expense of his right to free speech. Given Wells' momentum, he could have easily swayed 185 voters in the time he spent fighting this action.

Attorneys, even absent a state officer statute such as art. 371, have been found to be state actors when

they participate in a conspiracy to deprive plaintiffs of federal rights. *Tower v. Glover*, 467 U.S. 914 (1984). This is a significant limitation on *Polk County v. Dodson*, 454 U.S. 312 (1981), which had held that a public defender is not a state actor when performing traditional functions. In the instant case, Thornhill and his firm were not performing traditional attorney functions when they tried to turn themselves into private District Attorneys and private Attorney Generals by seeking criminal sanctions. This was more than the malpractice that was at issue in *Dennis v. Sparks*, 449 U.S. 24 (1980). It was an overt act to deprive Wells of his constitutional right to free speech under the color of state law. Notably, this Court further restricted the *Dodson* holding in *West v. Atkins*, 487 U.S. 42 (1988), noting that professionals are not exempt from suits under § 1983, just by virtue of being a professional. *Id.* at 51.

Here Thornhill and his law firm engaged in a conspiracy with Lamz and his committee, to usurp the United States Constitution by improperly seeking injunctive relief and criminal sanctions for the purpose of depriving Wells of federally protected rights. Consequently Thornhill and the Thornhill Law Firm, LLC meet the *Lugar* definition of state actors.

As discussed *infra*, this Court has indicated that the pursuit of an action under an unconstitutional statute is sufficient to trigger state action. This Court has held that a private party and his attorney can be liable under § 1983 for an action brought under an unconstitutional statute. *Wyatt v. Cole*, 504 U.S. 158 (1992). When, as here, the private party takes advantage of a private right of action created by the State, they can be found to be state actors. *Id.* at 161-62. On remand, the Fifth Circuit found that because the defendants and their attorney had invoked a private right in an

unconstitutional statute, they were liable under the "joint participation" prong of the *Lugar* test. *Wyatt v. Cole*, 994 F.2d 1113, 1117 (5th Cir. 1993). *See also*, *Lugar*, 457 U.S. at 941. When a plaintiff challenges the constitutionality of a statute the private party that sets the scheme in motion is a state actor. *Folsom Investment Co. v. Moore*, 681 F.2d 1032, 1037 (5th Cir. 1982). In the instant case, plaintiff has challenged the constitutionality of R.S. 18:1463(D) and (E), the provisions invoked by Thornhill and his firm in the state court petition.

Consequently, the defendants' conduct meets all three of the *Lugar tests* and they are considered state actors under § 1983.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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No. 05-30810

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN WELLS,

Plaintiff - Appellant,

versus

JAMES R. LAMZ; TOM W. THORNHILL; COMMITTEE TO ELECT JIM LAMZ; THORNHILL LAW FIRM, LLC; CHARLES C. FOTI, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

Defendants - Appellees.

November 13, 2006, Filed

NOTICE: RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

OPINION: PER CURIAM: *

AFFIRMED. *See* 5TH CIR. R. 47.6.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.

CIVIL ACTION NO.05-1500

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

JOHN B. WELLS

VERSUS

JAMES R.E. LAMZ, ET AL.

JUDGMENT

Considering the foregoing order,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of James Lamz, Tom Thornhill, Thornhill Law Firm, LLC, Committee to Elect Jim Lamz, Charles Foti, Attorney General of Louisiana, dismissing plaintiff's federal law claims with prejudice and dismissing plaintiff's state law claims without prejudice, with each party to bear its/his own costs. New Orleans, Louisiana, this 13th day of July, 2005.

STANWOOD DUVAL JR.
UNITED STATES DISTRICT JUDGE

U.S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

28 USC § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have

jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 USC § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of

any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 USC § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have

supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 USC § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature,

in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Louisiana Constitution Article IV § 8

There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a

term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

R.S. 18:1463

Political material; ethics; prohibitions

A. The Legislature of Louisiana finds that the state has a compelling interest in taking every necessary step to assure that all elections are held in a fair and ethical manner and finds that an election cannot be held in a fair and ethical manner when any candidate or other person is allowed to print or distribute any material which falsely alleges that a candidate is supported by or affiliated with another candidate, group of candidates, or other person, or a political faction, or to publish statements that make scurrilous, false, or irresponsible adverse comments

about a candidate or a proposition. The legislature further finds that the state has a compelling interest to protect the electoral process and that the people have an interest in knowing the identity of each candidate whose number appears on a sample ballot in order to be fully informed and to exercise their right to vote for a candidate of their choice. The legislature further finds that it is essential to the protection of the electoral process that the people be able to know who is responsible for publications in order to more properly evaluate the statements contained in them and to informatively exercise their right to vote. The legislature further finds that it is essential to the protection of the electoral process to prohibit misrepresentation that a person, committee, or organization speaks, writes, or acts on behalf of a candidate, political committee, or political party, or an agent or employee thereof.

B. (1) No person shall cause to be printed or assist in the distribution, transportation, or transmission by any means of any facsimile of an official ballot or cause to be printed, distributed, transported, or transmitted any unofficial sample ballot with the number of a candidate unless the name of the candidate to whom the ballot number was assigned is correctly listed on the ballot.

(2) No person shall cause to be printed or assist in the distribution, transportation, or transmission by any means of any facsimile of an official ballot, or cause to be printed, distributed, transported, or transmitted any unofficial sample ballot containing a photograph, or likeness of any person which falsely alleges, with an intent to misrepresent, that any person or candidate, or

group of candidates in an election is endorsed by or supported by another candidate, group of candidates or other person.

C. (1) No person shall cause to be distributed, or transmitted, any oral, visual, or written material containing any statement which he knows or should be reasonably expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters.

(2) Paragraphs (1) and (3) of this Subsection shall not apply to:

(a) Statements which merely express support for or opposition to a candidate or proposition.

(b) Statements on bumper stickers, lapel pins and stickers, lawn signs, hat bands, badges, ribbons, or to balloons, matchbooks, pens, pencils, and similar paraphernalia.

(c) Radio and television broadcasters who broadcast paid political announcements or paid advertisements that include the voice or picture of a candidate for public office.

(3) If an individual, association, organization, committee, or corporation is responsible for or causes the distribution or transmission of any statements relative to candidates or propositions which do not fully disclose the name of the individual or the name of the association, organization, committee, or corporation, and the full and correct name and address of its

chairman or other chief administrative officer and whether or not such individual, association, organization, committee, or corporation supports or opposes such candidate or proposition, such individual, association, organization, committee, or corporation shall report all expenditures incurred in relation to the publication, distribution, transportation, or transmission in accordance with R.S. 18:1491.7, 1495.5, or 1501.1.

(4)(a) No person shall misrepresent himself or any committee or organization under his control as speaking, writing, or otherwise acting for or on behalf of any candidate, political committee, or political party, or any employee or agent thereof.

(b) No person shall willfully and knowingly participate in or conspire to participate in a plan, scheme, or design to misrepresent himself or any committee or organization under his control or under the control of any other participant in the plan, scheme, or design as speaking, writing, or otherwise acting for or on behalf of any candidate, political committee, or political party, or any employee or agent thereof.

(c) A radio or television broadcaster who broadcasts a paid political announcement or advertisement, the content of which the broadcaster had no input in or control over, is not subject to the provisions of this Paragraph.

D. (1) An affected candidate or voter shall be entitled to an injunction to restrain future violations of Subsections B and C of this Section.

(2) In the event a permanent injunction is granted, reasonable attorney fees shall be allowed the petitioner by the court which shall be taxed as costs to be paid by the defendant.

E. Whoever violates any provision of this Section may be punished by a fine not to exceed five hundred dollars or be imprisoned for not more than six months, or both.

R.S. 49:251

A. The attorney general shall give his opinion in writing upon all questions of law when required by the governor, the state auditor, or the state treasurer. He shall consult with and advise the district attorneys on all matters pertaining to the duties of their offices whenever requested by them.

B. The attorney general shall, within thirty days of receipt of a request, give his opinion in writing upon all questions of law when requested by any state board, agency, or commission or by any political subdivision pursuant to Subsection C, except parish and municipal governing authorities.

C. A state board, agency, commission or political subdivision, except parish and municipal governing authorities, shall request an opinion of the attorney general whenever its counsel advises that the public bid law of this state is not applicable to the particular state board, agency, commission, or political subdivision, except parish and municipal governing authorities. No state board, agency, commission, or political subdivision, except parish and municipal

governing authorities, shall act in accordance with its attorney's advice that the public bid law of the state is not applicable to the particular body until an attorney general's opinion is rendered and received.

R.S. 49:252

The Attorney General shall report to the legislature at the commencement of each regular session convening in even numbered years on all official business done by him during the preceding biennium. He shall specify the suits and prosecutions at which he attended, the number of persons prosecuted, the crimes for which and the parishes in which the prosecutions were had, the results thereof, and the punishments imposed.

He shall include in his biennial report an abstract of the annual reports of the several district attorneys, with such observations and statements as in his opinion the criminal jurisprudence and the proper and economical administration of the criminal law of the state shall warrant.

(2)

No. 06-1109

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN WELLS,

Petitioner,

v.

JAMES R. LAMZ, TOM W. THORNHILL; COMMITTEE TO ELECT JIM LAMZ; THORNHILL LAW FIRM, LLC; CHARLES C. FOTI, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAMES "JIM" LAMZ

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INTRODUCTION

Petitioner Wells has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* to be granted ("Petition"). See Supreme Court Rule 10. Specifically, Petitioner fails to demonstrate that the Fifth Circuit's November 13, 2006 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. See Supreme Court Rule 10(a)-(c). Therefore the Petition should be denied.

Petitioner first contends that the Fifth Circuit erred in affirming the District Court's Motion to Dismiss, when the Court had jurisdiction to hear the case under the Declaratory Judgment Act and the Eleventh Amendment did not bar the action, on contravention of this Court's precedent and the holdings of other circuit courts of appeal. As to this first question presented, Respondent Lamz respectfully disagrees and will defer to the briefs of other Respondents including Charles C. Foti, Jr., Attorney General of the State of Louisiana, as to the constitutionality of the state statute at issue.

Respondent Lamz respectfully disagrees with the second question presented by Petitioner. The Fifth Circuit correctly affirmed the District Court's granting of the Motion to Dismiss against all defendants. Both Courts appropriately found that there was no deprivation of the Petitioner Wells' protected First Amendment Right to freedom of speech and further that the filing of a request for a Temporary Restraining Order as provided for in Louisiana Election Code under LSA-R.S. 18:1463 by then candidate for judge and private citizen Lamz was not an action which would constitute "state action".

Petitioner herein has failed to show that the actions of the District Court and the Fifth Circuit Court of Appeals are in contravention of this Court's legal precedent or the holdings of other circuit courts of appeal. Simply put, Petitioner has failed to completely carry his burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition for Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

This matter stems from a Louisiana state court lawsuit that was filed prior to the election for Slidell City Court Judge held on November 2, 2004. The Plaintiff, John B. Wells and the Defendant, James R.E. Lamz were candidates in the election. On November 3, 2004, Lamz was declared the winner of the election and is now presiding as Judge of Slidell City Court for the State of Louisiana.

In his Complaint Petitioner Wells alleges that Lamz, through his counsel, defendants Thornhill and Thornhill Law Firm LLC, filed a petition for injunctive relief in state court on October 29, 2004, alleging that Wells' campaign material violated La. R.S. 18:1463 of the Louisiana Election Code. (Complaint ¶ XXXII) Wells further alleges that the petition seeking injunctive relief, filed on behalf of Lamz, was filed to prevent Wells from airing commercials or mailing campaign literature. (Complaint ¶ XXXII) In his complaint, Wells acknowledges that on the same day, October 29, 2004, the State District Court denied Lamz's motion for a Temporary Restraining Order. (Complaint ¶ XXXIII)

On the day following the election, November 3, 2004, Lamz filed a Supplemental and Amending Petition for Injunctive Relief and Damages. On that day, Wells filed a Special Motion to Strike pursuant to the Louisiana Code of

Civil Procedure. Again Wells specifically acknowledges in the pleadings filed on November 3rd that the State District Court had denied Lamz's request for TRO on the same day it was filed on October 29th. (at ¶ XLII and ¶ XLIII)

Petitioner Wells alleges that he was deprived of his constitutional rights under 42 U.S.C. §1983. Wells alleges that Lamz's counsel, Thornhill, acted under the color of state law by filing the petition on October 29, 2004, for the purpose of denying Wells his right to free speech guaranteed by the First and Fourteenth Amendments of the Constitution. However, it is most important to note that at no time prior to or including the date of the election was the distribution or publication of Wells' campaign materials ever restrained or prohibited in any way. In fact, the Temporary Restraining Order (TRO) filed by Lamz was acted upon quickly by the state court. The TRO was denied on October 29, 2004, the same day it was filed and days *before* the scheduled election of November 2, 2004. In short Petitioner Wells was successful in the state court and suffered no deprivation of any constitutionally guaranteed rights.

In his Complaint to the United States District Court for the Eastern District of Louisiana, Petitioner Wells alleges that Defendant Lamz acted under the color of state law by seeking recourse in the district courts of the State of Louisiana. Petitioner alleges that Lamz's actions of seeking legal redress in the form of a Request for TRO under the provisions of the Louisiana Election Code pursuant to LSA-R.S. 18:1463 caused Wells to lose the election. Furthermore, Petitioner Wells alleges that Lamz conspired with others to limit and restrict Wells' rights to free speech thus violating his rights under 42 U.S.C. §1985. Petitioner's allegations are not well founded.

Defendant Lamz filed an Answer to the Complaint denying the allegations contained therein and then filed a Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6). Similar motions were filed by all of the other named defendants in this action on the same legal principles. On July 13, 2005, Judge Stanwood R. Duval Jr. granted the Motions to Dismiss filed by each defendant. The District Court issued judgment in favor of defendants and against plaintiff Wells dismissing plaintiff's federal law claims with prejudice and dismissing plaintiff's state law claims without prejudice.

Petitioner Wells then filed a timely notice of appeal. The matter was briefed and ultimately Oral Argument was afforded to all before the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the District Court ruling in favor of defendants and against plaintiff Wells dismissing plaintiff's federal law claims with prejudice and dismissing plaintiff's state law claims without prejudice. Petitioner Wells then filed a timely Petition for Writ of *Certiorari* to this Court.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. See Supreme Court Rule 10.

THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF DEFENDANT LAMZ'S MOTION TO DISMISS: THE DECISIONS BELOW ARE ENTIRELY CONSISTENT WITH *LUGAR*

Petitioner Wells did not establish a claim under 42 U.S.C. § 1983 in the trial court. In *Daniel v. Ferguson*, 839 F.2d

1124 (5th Cir. 1988), the court stated that to prevail under 42 U.S.C. §1983, a plaintiff must prove "(1) that he has been deprived of a right secured by the Constitution and the laws of the United States and (2) that the persons depriving him of this right acted under 'color of state law' of the state." *Id.* at 1128. This Court has applied a two-prong analysis, indicating that private conduct "fairly attributable to the state" may also be actionable under 42 U.S.C. § 1983. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185(1978).

To satisfy the first prong, Petitioner Wells must prove that Defendant Lamz deprived Wells of some right secured by the Constitution and laws of the United States. In order to satisfy the second prong Petitioner Wells must prove that Defendant Lamz was acting under the color of state law. *Adickes v. S.H. Kress & Co.*, 389 U.S. 144 (1970); and *Flagg Brothers, Inc.*, 436 U.S. 149 at 155. Simply stated, at no time was Lamz a state actor nor did he act under the color of state law. As a judicial candidate and private citizen, Lamz utilized the provisions of the Louisiana Election Code under LSA-R.S. 18:1463 and filed a TRO with the state court due to his concerns of improper campaign practices by Wells. The reference in the petition for TRO of the criminal sanctions specifically provided for in the statute does not in and of itself rise to the level of state actor. Nor does that fact that Lamz was an attorney at law actively running for judge make him a state official. Petitioner Wells has repeatedly failed to satisfy both prongs of the analysis in *Lugar*. Accordingly, the District Court appropriately granted the Motions to Dismiss and the Fifth Circuit correctly affirmed.

FIRST PRONG: PLAINTIFF WELLS WAS NOT DEPRIVED OF ANY FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

In this case, Petitioner Wells alleges that he was deprived of his constitutional rights to free speech as guaranteed by the First and Fourteenth Amendments as a result of the filing of a state court petition on behalf of Defendant James Lamz for injunctive relief (TRO) dealing with campaign issues. Petitioner Wells claims that the sole purpose for the filing for the TRO was an attempt by Lamz to deny Plaintiff Wells of his right to free speech. Specifically Wells alleges in the Complaint (¶ XXXII) that suit was filed on October 29, 2004 for injunctive relief by Lamz in state court. Then, in the following paragraph of his Complaint (¶ XXXIII), Plaintiff Wells acknowledges that the state court petition seeking injunctive relief filed on behalf of Lamz was denied the very day it was filed – October 29, 2004. These statements by Petitioner are correct. The TRO was filed and was denied by the state court on the same day.

There is no question that the TRO sought by Lamz was promptly denied by the state court on the very day that it was filed. The state court found that Lamz could not carry his burden as required under Louisiana law in seeking injunctive relief. The state court ruling was therefore not a finding of fact, but a denial of injunctive relief as requested. Therefore, as a result of the ruling by the state court, there was nothing to prohibit, delay or restrain the publication, distribution or dissemination of any of Petitioner, and then candidate, Wells' campaign materials prior to the election of November 2, 2004.

In reality, Mr. Wells was the victor in the state court since Lamz's Request for TRO was denied. At no time was Wells ever deprived of a right secured by the Constitution or laws

of the United States. Plaintiff Wells had every opportunity to continue to campaign until the close of the election on November 2nd. At no time did the state court ever issue any type of injunction denying Plaintiff Wells' right to free speech or in any way restricting any of Wells' campaigning including public appearance, content of campaign materials or running television and/or radio advertisements.

THE DISTRICT COURT BELOW CORRECTLY APPLIED THE HOLDING IN *COLSON v. GROHMAN* TO THE CASE *SUB JUDICE*

Petitioner's brief is wholly silent and simply ignores the precedent in the Fifth Circuit which is in harmony with the law of this Court and other Circuits in the case of *Colson v. Grohman*, 174 F.3d 498 (5 Cir.1999). In its finding that Wells was not deprived this matter, the District Court relied heavily on the case of *Colson*. In *Colson*, the plaintiff, a former city counsel member, brought a civil rights action against various city officials including the police chief for their alleged violations of her right to free speech and her Fourteenth Amendment rights. The matter was removed to the United States District Court to pursue actions for defamation, libel, due process violations and allegations under 42 U.S.C.§ 1983 for violations of her rights under the First and Fourteenth Amendments. All defendants filed motions for summary judgment as to Colson's § 1983 claims and contended that Colson had failed to allege any deprivation of a cognizable constitutional right. (*Id.* at 505) The District Court granted the Defendants' Motions for Summary Judgment on the First and Fourteenth Amendment claims and dismissed those claims. Colson then appealed.

The Court of Appeals on review held that the actions of the defendants' including false charges and circulation of unfounded recall petition against the city counsel member

Colson in alleged retaliation for Colson's exercise of her own free speech rights, were not sufficiently serious either individually or as part of a campaign of retaliatory harassment to rise to the level of First Amendment violation.

In the case *sub judice,* the District Court below cited *Colson* at length noting the "very complex factual pattern" that presented itself therein. The Fifth Circuit Court of Appeals in *Colson* specifically made great effort to describe "in detail the long and tortured history" of the *Colson* case "[b]ecause the precise nature of the harms suffered by a plaintiff claiming First Amendment retaliation is crucial to our determination of whether she has alleged a constitutional deprivation,". (*Id.* at 500) In *Colson*, the alleged harassing actions of defendants occurred over a two year period from the time Colson was elected in 1992 until the grand jury was empanelled in early 1994 to examine charges of retaliation and coercion. The grand jury returned a no true bill on both charges. (*Id.* at 504) In May of 1994, Colson lost her reelection bid by a wide margin. (*Id.* at 504)

In examining the allegations asserted by the plaintiff Colson, the Fifth Circuit Court of Appeals specifically noted "[w]e first emphasize what did not happen: Colson was never arrested, indicted, or subjected to a recall election. Nor was she formally reprimanded." (*Id.* at 511) The court went on to note that "[o]n the contrary, Colson has alleged only that she was the victim of criticism, an investigation (or an attempt to start one), and false accusations: all harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence." (*Id.* at 512).

In the case at bar, the District Court also examined the chronology of the events and the allegations of the plaintiff Wells, citing the above quotations from *Colson* as authority with emphasis on "what did not happen" to Wells. (Opinion

at 28) The District Court noted that the Motion for Temporary Restraining Order was filed in the state court on October 29, 2004 and was promptly denied that very same day. At no time were there any charges filed against Wells, no grand jury was ever empanelled, Wells was never arrested and there was no investigation. At no time was there any prohibition on Wells' speech in any form - including his scheduled campaign events and appearances, print ads, publications and fliers, television and/or radio ads, or any other campaign activities. In fact, the state court denied the TRO requested by Lamz, in effect finding in favor of Wells.

Without question, the First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation for the exercise of that right. *See e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). However, not every action in response to an individual's exercise of his right to free speech is an actionable First Amendment harm. *See Colson,* 174 F.3d at 510. For example in the case of *Mattox v. City of Forest Park,* 183 F.3d 515, 522 (6th Cir.1999), the Court held that adverse publicity which caused a public official to lose her election was not the type of adverse action against which the First Amendment protects. Therefore, Petitioner Wells' claim for relief under § 1983 based on violation of his rights under the First Amendment must be dismissed.

The court in *Colson* stated and the District Court referenced in its Opinion that the alleged campaign of retaliation taken against Colson simply did not rise to the level of constitutional deprivation.

> "Even viewing the summary judgment evidence in the light most favorable to Colson, the defendants' allegedly retaliatory crusade

> amounted to no more than the sort of steady stream of false accusations and vehement criticism that any politician must expect to endure." *Cf. Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121,123 (5 Cir.1991) *Id.* at 514.

The District Court below appropriately relied on *Colson* in holding that any injury suffered by Wells was not of constitutional dimension. The ruling in the *Colson* case is dispositive of this issue. Petitioner Wells on appeal to the Fifth Circuit previously argued that the *Colson* case is not controlling "because the harm suffered in that case was more remote and less direct harm suffered by Wells." (Brief at page 27) Respondent Lamz respectfully disagrees. Far less happened to Mr. Wells than happened to Ms. Colson. Despite Petitioner's repeated and consistent claims that criminal charges were "filed" by virtue of the mention of the criminal sanctions set out in LSA-R.S. 18:1463(E) in the Request for TRO, no criminal charge was ever filed against Wells.

In this case, Petitioner Wells has failed to show that he was deprived of his constitutional right to free speech as a result of the filing of a state court petition on behalf of Defendant James Lamz for injunctive relief (TRO) dealing with campaign issues. Accordingly, Respondent Lamz submits that Petitioner Wells has not established any compelling reasons for this Court to grant the Petition and therefore the Petition should be denied.

SECOND PRONG: DEFENDANT LAMZ IS NOT A "STATE ACTOR" AND THE ACTIONS OF LAMZ DID NOT CONSTITUTE STATE ACTION

Wells' Complaint was filed against a private defendant James Lamz who cannot be labeled as a "state actor". Lamz is an attorney-at-law, in good standing, licensed and

practicing in the State of Louisiana and after successfully winning the election in November of 2004 has served as the Judge of Slidell City Court since that time. All the actions complained of by the plaintiff Wells are alleged to have occurred before the election.

At all times material herein, Lamz was a fellow candidate for judge to fill the Slidell City Court vacancy. "State action" requires some manner of state responsibility for the actions which underlie the 42 U.S.C. §1983 claim. *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 387 (5th Cir. 1985). A private person does not act under color of state law simply because he invokes state authority. *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991)

Conduct is fairly attributable to the state where: (1) it is "caused by the exercise of some right or privilege created by the state or by rule of conduct imposed by the State or for whom the state is responsible;" and (2) where the party charged with the deprivation is a person who may "fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).The first part of this test is easily met, but the second part requires Petitioner Wells to prove that Lamz's conduct may fairly be attributable to the state.

In *Lugar v. Edmunson Oil Co., Inc.*, 457 U.S. 922, 929-930 (1982), the court sets out three tests that could be used to meet this requirement. The *Lugar* case is addresses an essentially settled issue that does not merit this Court's attention. Even if this Court were inclined to address this issue, this case does not present such an opportunity because Petitioner never proffered any evidence that Lamz was a state actor or that Lamz was cognizant of any constitutional challenge to the State Election Code.

1. PETITIONER FAILS TO MEET ANY OF THE THREE PART TESTS IN *LUGAR* TO DETERMINE A "STATE ACTOR".

a.) Petitioner Fails to Meet Part 1 of *Lugar* - "Public Function Test"

The first test under *Lugar* is the "Public Function Test". Petitioner Wells continues to argue that the defendants including Lamz "filed" criminal charges. Despite his repeated and consistent claims that criminal charges were "filed" by virtue of the mention of the criminal sanctions set out in LSA-R.S. 18:1463(E) in the Request for TRO, no criminal charges were ever filed against Wells. Without question, the filing of charges is a function of the state; however, Lamz was not a state actor and was at all times pertinent herein a private individual who as a candidate for public office availed himself of the appropriate provisions of the Louisiana Election Code. There is nothing about the actions of Lamz that can be reasonably attributable to the state.

The most significant flaw in appellant's argument is that despite his insistence that there were, there were ***never*** criminal charges filed. Under the Louisiana Code of Criminal Procedure in order for criminal charges to be filed in a parish court, they have to be "instituted by affidavit or information charging any offense. La C. Cr. P. Art. 382(B)(2). This would require the involvement of the District Attorney and quite simply, this never happened.

What did occur is that Lamz then a fellow candidate for Judge, with the assistance of counsel, filed a request for injunctive relief in the Twenty-Second Judicial District Court for the Parish of St. Tammany, State of Louisiana, alleging that candidate Wells had violated the Election Code under LSA-R.S.18:1463. Under section E of this statute,

"[w]hoever violates any provision of this Section may be punished by a fine not to exceed five hundred dollars or be imprisoned for not more than six months or both." The fact that the provisions of the statute were outlined in the pleadings in the state court proceeding does not in any way make Lamz a state actor or pass the "public function test" in *Lugar*. In this case, there were never any criminal charges filed. Petitioner fails to meet part 1 of *Lugar* - the "Public Function Test"

b.) Petitioner Fails to Meet Part 2 of *Lugar* - "State Compulsion Test"

The second test under *Lugar* is the "State Compulsion Test" which provides that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Petitioner Wells argues that the state provided defendants the right of action under Louisiana Revised Statute 18:1463D(1) and that this is overt encouragement.

This argument is not valid. Obviously each state must provide its candidates for elective office an avenue and means to address their concerns regarding political speech and campaign material. Applying appellant Wells' argument to the facts of this case, there would either have to be no statute that allowed candidates to challenge their opponent's speech and publications or every action instituted regarding elections would fall under federal jurisdiction because the state provided the candidate with the avenue to seek an injunction. Applying Wells' logic would result in a flood of federal actions for each and every election throughout this state and the country. This argument is simply misplaced.

Furthermore, appellant Wells argues that the state provided the defendants with an avenue that limited his right to speech because he had to interrupt his campaigning to travel to the District Court and respond to the Request for TRO. Plaintiff Wells therefore complains on the one hand that he was given due process in the state proceedings and allowed to address those issues, but that on the other hand his right to speech was violated by the state since he could not campaign at the same time he was in court. Wells elected to represent himself in state court rather than continue campaigning. There was no court order or other prohibition against his right to campaign, to disseminate information or to print materials at any time pertinent herein. This test fails as well.

c.) Petitioner Fails to Meet Part 3 of *Lugar* - "nexus or joint action test"

The third test under *Lugar* is the "nexus or joint action test" which provides that the "state action may be found where the government has insinuated itself into a position of interdependence that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-358 (1974). Wells uses the same argument here as before, namely that the state provided an avenue for the defendants under LSA-R.S. 18:1463D and further that the state provided the use of their courts. Wells is suggesting that the state and Defendant Lamz are in joint participation because state courts are used to seek injunctive relief. Plaintiff's position is untenable.

In this case, Defendant Lamz as a private individual filed a state court lawsuit for injunctive relief alleging that Plaintiff Wells had violated Louisiana Revised Statute 18:1463

regulating elections, particularly section C(1) which provides that:

> [n]o person shall cause to be distributed or transmitted any oral visual or written material containing any statement which someone knows or should reasonably be expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters.

This statute specifically authorizes injunctive relief and provides for sanctions against violators. LSA-R.S. 18:1463 D(1) provides that "[A]n affected candidate or voter shall be entitled to an injunction to restrain future violations of Subsections B and C of this Section." Lamz filed his suit in state court for injunctive relief following the applicable law and utilizing the appropriate procedure.

There is no dispute and Petitioner Wells specifically admits in his Brief that the state court denied the TRO filed by Lamz on the very same day that it was filed. By filing the TRO in state court, Lamz was merely availing himself of the procedure set forth by the State of Louisiana for seeking injunctive relief under La. R.S. 18:1463 *et seq.*, and therefore cannot be deemed to be a state actor solely by virtue of doing so. In the alternative, for a private citizen to be held liable pursuant to §1983, "the plaintiff must allege that the citizen conspired with or acted in concert with state actors." See *Priester v. Lowndes County,* 354 F.3d 414, 420 (5th Cir.2004) and *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754. A private citizen must be a "willful participant in joint activity with the State or its agents." *Priester*, 354 F.3d at 420. Conclusory allegations of conspiracy, without reference to specific facts, will not suffice. *Id.*; *Brinkman v. Johnson*, 793 F.2d 111, 112-113 (5th Cir. 1986).

Petitioner has only made such veiled suggestions in one sentence of his Brief in which he writes on page 21 as follows:

> Here Thornhill and his law firm engaged in a conspiracy with Lamz and his committee, to usurp the United States Constitution by improperly seeking injunctive relief and criminal sanctions for the purpose of depriving Wells of federally protected rights. Consequently Thornhill and the Thornhill Law Firm, LLC meet the *Lugar* definition of state actors.

It should be noted that Petitioner does not assert in his Brief to this Court that Lamz is a state actor, although he has taken this position in the past.

At all times material herein, Defendant James Lamz was a private citizen. Therefore Wells must prove that Lamz was a willful participant in joint activity with the State or its agents, or that Lamz conspired with or acted in concert with state actors in order to implicate a cause of action under §1983. Petitioner has not set forth any factual allegations with respect to a conspiracy or a mutual understanding between Lamz and any state agent or official. A civil conspiracy pursuant to §1983 is an agreement between private and public actors to violate a plaintiff's constitutional rights. *Bayou Fleet, Inc. v. Alexander*, 68 F.Supp.2d 734, 745 (E.D. La. 1990)

Petitioner Wells argues that 42 U.S.C §1983 is implicated in this matter because in the underlying state matter, he called into question the constitutionality of Louisiana Revised Statute 18:1463. A similar argument was attempted in the case of *Parker v. Byrd & Wisner*, 947 F.Supp. 245 (S.D. Miss. 1996). In *Parker*, the Court held that the private attorney did not become a state actor by virtue of using the state

procedures for filing a lawsuit. The plaintiff in *Parker* also argued that 42 U.S.C §1983 was implicated because in the underlying state court action the defendants relied upon an unconstitutional state statute for their lawsuit. It was further argued that the defendants' state lawsuit amounted to malicious prosecution. The Court found those arguments to be without merit and subject to the same analysis the Court applied to the plaintiff's other arguments for the §1983 claims. *Parker*, 947 F.Supp. 245, 251. For the same reasons, this Honorable Court should reject such an argument.

This Court in *Lugar* faced a similar charge that private defendants' attachment suit was "unlawful under state law." *Lugar*, 457 U.S. at 940, 102 S.Ct. at 2755. In discussing this claim, the Court made plain that "private misuse of a state statute does not describe conduct that can be attributed to the State." *Id.* at 941, 102 S.Ct. at 2756. The choice to invoke the "statute without the grounds to do so could in no way be attributed to a state rule or state decision"; this act is "contrary to the relevant policy articulated by the state." *Id.* at 940, 102 S.Ct. at 2755. For this reason, complaints "alleg[ing] only misuse or abuse of the statute" do not "present a valid cause of action under §1983." *Id.* at 942, 102 S.Ct. at 2756.

As noted by the court in *Wyatt v. Cole* 994 F.2d 1113 (C.A.5 (Miss.),1993) "[i]n the wake of *Lugar*, several courts have recognized and given effect to this principle." *See, e.g., Davis Oil Co. v. Mills*, 873 F.2d 774, 779-80 (5th Cir. 1989) (discussing *Lugar*); *Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1335-36 (10th Cir.1992); *Hoai v. Vo*, 935 F.2d 308, 313-14 (D.C.Cir.1991), *cert. denied*, 503 U.S. 967, 112 S.Ct. 1578, 118 L.Ed.2d 220 (1992); *Jones v. Poindexter*, 903 F.2d 1006, 1010-11 (4th Cir.1990); *Collins v. Womancare*, 878 F.2d 1145, 1152-54 (9th Cir.1989), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990); *Winterland ConcessionsCo. v. Trela*, 735 F.2d 257, 262 (7th Cir.1984).

"OFFICER OF THE COURT" DOES NOT EQUAL "STATE ACTOR"

Petitioner Wells argues that pursuant to Louisiana Code of Civil Procedure Article 371, an attorney "by virtue of his status as an officer of the court" is therefore legislatively declared a state official and consequently a "state actor". This Article makes no such declaration, and reads in its entirety as follows:

> **Louisiana Code of Civil Procedure Article 371 - Attorney**
>
> An attorney at law is an officer of the court. He shall conduct himself at all times with decorum, and in a manner consistent with the dignity and authority of the court and the role which he himself should play in the administration of justice.
>
> He shall treat the court, its officers, jurors, witnesses, opposing party, and opposing counsel with due respect; shall not interrupt opposing counsel, or otherwise interfere with or impede the orderly dispatch of judicial business by the court; shall not knowingly encourage or produce false evidence; and shall not knowingly make any misrepresentation, or otherwise impose upon or deceive the court.
>
> For a violation of any of the provisions of this article, the attorney at law subjects himself to punishment for contempt of court, and such further disciplinary action as is otherwise provided by law.

Petitioner Wells and Respondent Lamz are both attorneys at law and were both candidates for the election to fill the seat for judge of Slidell City Court. To suggest that each and every attorney at law in the state of Louisiana is a "state actor" by virtue of LSA-Louisiana Code of Civil Procedure Article 371 is beyond reason and would open Pandora's Box to litigation and claims of state action under §1983 and other statutes.

Petitioner Wells argues that attorneys have been found to be state actors when they participate in a conspiracy to deprive plaintiffs of federal rights. Respondent submits that Petitioner Wells does not provide the complete facts from the cases cited which render the cases distinguishable from the facts of the case at bar.

For example, in the case of *Tower v. Glover,* 467 U.S. 914, 104 S.Ct. 2820 (U.S.1984), the client filed a *pro se* action alleging that the public defenders who represented him in his prior state criminal action violated civil rights statutes by conspiring with various public officials to violate their client's constitutional rights. This Supreme Court held that (1) the complaint adequately alleged conduct "under color of" state law in view of the conspiracy allegations, and (2) state public defenders are not immune from liability under §1983 for intentional misconduct by virtue of alleged conspiratorial actions with state officials which deprived their clients of federal rights.

In *Tower*, the public defenders were found to be state actors not by the mere fact that they were attorneys, but by their participation in the conspiracy with public officials. Therefore, the *Tower* decision is not inconsistent with the holding in *Polk County v. Dodson,* 454 U.S. 312, 102 S.Ct. 445 (U.S.,1981) that a public defender does not act "under color of state law" in performing a lawyer's traditional

functions as counsel to an indigent defendant in a state criminal proceeding.

In the case at bar, there is no allegation that Lamz or his attorney of record worked in joint participation with any state official in filing the Request for TRO. Lamz reasonably resorted to the legal process set out in the Louisiana Election Code. With the assistance of counsel and in accordance with the provisions of LSA-R.S. 18:1463, the Request for TRO was filed. The Request for TRO was immediately denied by the state court. There was no action by the state to deprive Wells of any rights. In fact, the state operated and acted to Wells' benefit – not to his detriment.

The case law simply does not support a finding that an action under §1983 exists merely because a lawyer filed a lawsuit based on what may be ultimately determined to be an unconstitutional statute. (See *Parker*, *supra*) The District Court correctly held that there was no constitutional deprivation to Wells in this case and stated as follows:

> THE COURT: I understand he was inconvenienced, but it doesn't rise to the color of state law, which I think is a closer question frankly. I feel that it requires the state to do something, to implement the alleged unconstitutional statute, other than simple act as a judge and rule on it. They would have to do something that would restrain him." (Doc. 51 at page 33 lines 16 through 21)

For the reasons set forth above, Petitioner Wells' arguments for converting Lamz to a state actor and Wells' suggestions that Lamz conspired in some way with other state actors or state officials should be rejected. Our courts have

consistently rejected attempts by litigants to define state action under §1983 as simply the use of the state's judicial process and procedures. See *Miller v. Hartwood Apartments, Ltd.*, 689 F.2d 1239, 1242 (5th Cir. 1982)(the mere use of state process does not support a §1983 claim); See *Howard v. Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir.1988) (a litigant does not "act under color of state law" by merely filing a lawsuit and seeking a temporary injunctions); *Wyatt v. Cole*, 994 F.2d 1113, 1117-1118 (5th Cir.1993), cert.denied, 510 U.S. 977, 114 S.Ct. 470, 126 L.Ed.2d 421 (1993) (even the misuse or abuse of the judicial process does not constitute state action). Accordingly, Petitioner Wells has failed to show that defendant Lamz is a "state actor" and has failed all three parts of the *Lugar* test.

CONCLUSION

In conclusion, Petitioner Wells has not established a claim under 42 U.S.C. §1983. To prevail under 42 U.S.C. § 1983, a plaintiff must prove "(1) that he has been deprived of a right secured by the Constitution and the laws of the United States and (2) that the persons depriving him of this right acted under 'color of state law' of the state." (See *Daniel v. Ferguson*, 839 F.2d 1124 (5th Cir. 1988)). Petitioner has failed on both counts.

The District Court, after accepting the pleadings as true for the 12(b)(6) Motion found that there was no deprivation of Plaintiff's First Amendment right to freedom of speech. "The Plaintiff can't show that any of his speech was actually restrained." (Opinion at page 45 lines 16-17) The District Court rightly addressed the similarities to the *Colson* case in finding that there was no deprivation. The District Court cited the *Colson* decision where the court stated "[a]ccordingly, this circuit has held that although some actions may have the effect of chilling the plaintiff's protected speech, they

are not actionable." (Opinion at page 47 citing *Colson* at page 511) The District Court went on to rule that the plaintiff Wells could not show the sufficient chilling effect on his speech for there to be a constitutional deprivation.

In addition, the District Court correctly applied the applicable law to the facts and held that there was no state action in this case "because the state under all the tests, something has to be done, even if it's unwitting by the state, as it was with the sheriff in the replevin case." (Opinion at page 49 lines 20-23) "[N]o action was taken here by the state. The state did nothing – did not use these procedures against this gentlemen." (Opinion at page 49 line 25 through page 50 line 2) The District Court went on to note that even if criminal charges were filed in this matter, under the case law the simple filing of state charges is not sufficient to establish state action.

Petitioner Wells failed to satisfy both prongs of the analysis in *Lugar*. Respondent Lamz was not a state actor, and at no time was acting under the color of state law. As a judicial candidate, Lamz utilized the provisions of the Louisiana Election Code under LSA-R.S. 18:1463 and requested a TRO from the state court based on his concerns of improper campaign practices by Wells. The reference in the Request for TRO of the criminal sanctions provided for in the statute does not of itself rise to the level of state action nor does the fact that Lamz is an attorney-at-law make him a state official. The District Court appropriately granted the Motion to Dismiss pursuant to Rule 12(b)(6) filed by Lamz and the Fifth Circuit properly affirmed.

Accordingly, Respondent Lamz submits that Petitioner Wells has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent Lamz respectfully requests that the Petition be denied.

Respectfully submitted,

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